United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

#1

75-2005

To be argued by: Eric A. Schwartz

UNITED STATES COURT OF APPEALS

ORIGINAL COPY

FOR THE SECOND CIRCUIT

Docket No. 75-2005

B
P

PAUL J. CARDAROPOLI,	Nos. 75-2005
JOSEPH MAIDA,	75-2015
MAURICE H. BARSKY,	75-2023
LOUIS C. PISELLI,	75-2024
WILLIAM SILVERMAN,	75-2025
HOWARD SILVERMAN,	75-2026
NICHOLAS LASORSA,	75-2033

Petitioners-Appellees,

-v.-

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PETITIONERS-APPELLEES

PIERCE O'DONNELL
DENNIS E. CURTIS
STEPHEN WIZNER
MICHAEL J. CHURGIN
Attorneys for Petitioners-Appellees
127 Wall Street
New Haven, Connecticut 06520

On Brief:

Eric A. Schwartz
Yale Law School
Class of 1976

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos.

75-2005, 75-2015
75-2023, 75-2024
75-2025, 75-2026
75-2033

PAUL J. CARDAROPOLI, et al.,

Petitioners-Appellees,

-v.-

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut, et al.,

Respondents-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PETITIONERS-APPELLEES

STATEMENT

These seven consolidated cases concern habeas corpus actions brought by the petitioners-appellees (hereinafter petitioners), inmates at the Federal Correctional Institution in Danbury, Connecticut, to redress the injuries suffered as a result of arbitrary and capricious treatment by respondents-appellants (hereinafter respondents), officials of the United States Bureau of Prisons, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. Petitioners maintained that their designations as "Special Offenders" (or "Special Cases") by the Bureau of Prisons, because of alleged connections with "organized crime," had resulted in serious deprivations and the grievous loss of liberty.

Specifically, they claimed that they had been denied equal access to important rehabilitative programs, including social furloughs, work release, and extramural educational opportunities, transfers to Community Treatment Centers (CTC's) and other correctional facilities, and release on parole, on the sole

ground that they had been designated "Special Offenders." In addition, they alleged that this designation caused them to be subjected to administrative procedures and delays not applicable to other inmates and to be stigmatized as members of organized crime. They further complained that these "Special Offender" designations had been imposed without factual justification, without legal authority, and without any adequate procedures, consistent with fundamental procedural due process protections, for determining whether and how the "Special Offender" designation should be made.

On March 18, 1974, petitioner Cardaropoli filed a pro se habeas corpus petition challenging his classification as a "Special Offender" 1/ by respondents because of his purported association with organized crime. He alleged that his designation had deprived him of access to institutional work release and community treatment center programs and social furloughs and had reduced his chances for parole. Joint Appendix at 4-7 (hereinafter App.).

The Government responded to a show cause order on March 27, 1974, arguing that petitioner's designation was supported by a strong basis in fact, and that considerations of public protection, prison discipline and rehabilitation made identification of members of organized crime a valid policy. Furthermore, the Government asserted, petitioner could show no grievous loss as a result of the classification. App. at 9-10.

On April 9, 1974, petitioner Cardaropoli filed a reply to the Government's response in which he denied that any reasonable basis in fact supported the "Special Offender" designation as applied to him. He further asserted that he had been injured by the designation and would continue to be adversely affected in the future. App. at 11-14. A supplementary reply to the Government's

---

1/ Similar petitions were later filed by each of the other appellees in these consolidated cases.

response, filed by petitioner on July 18, 1974, further detailed the injury he had suffered as a result of his "Special Offender" designation. App. at 16-17.

On October, 9, 1974, the United States District Court for the District of Connecticut (Zampano, J.) held that classification of an inmate as a "Special Offender," given the grave consequences flowing from such classification, constitutes a "grievous loss" requiring rudimentary due process protections before the imposition of any such designation. Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1974).

Because petitioner Cardaropoli had been classified in violation of the principles enunciated in Catalano v. United States, supra, the Court below (Zampano, J.) entered a judgment on October 24, 1974, in which it ordered:

> 1. That the respondents forthwith remove and totally expunge the "Special Case" classification from all records and files maintained by the Bureau of Prisons or by any of its institutions with respect to petitioner;
> 2. That the respondents are hereby enjoined from reclassifying petitioner as a "Special Case" unless he is accorded procedural due process as set forth in Catalano v. United States.

App. at 18. 2/

Shortly thereafter, on November 22, 1974, petitioner Cardaropoli filed an Application for Supplemental Relief, complaining that respondents had blatantly attempted to circumvent the order of the Court below. He alleged that while respondents had gone through the transparent motions of physically removing the "Special Offender" stamp from petitioner's file and records, they continued to treat him in all respects as a "Special Offender" as evidenced by denial of his recent furlough request. App. at 20-25. On December 30, 1974, the Government responded to a show cause order, App. at 27-28, and three weeks later, petitioner filed a reply to the Government's response. App. at 30-46.

2/ Similar "Catalano orders" were entered by the Court below on behalf of each of the other appellees in these consolidated cases.

At an evidentiary hearing on February 11, 1975, petitioner's counsel outlined the arguments supporting petitioner's entitlement to supplemental relief and introduced extensive documentary evidence. 3/ In lieu of petitioner's testimony and in the interest of expediting the proceeding, affidavits were received in evidence without objection. Following petitioner's resort to further administrative remedies pendente lite, a proposed stipulation of dismissal of the Application for Supplemental Relief was filed on April 7, 1975, in view of petitioner's release by respondents on a five-day social furlough. Separate Appendix at 427 (hereinafter referred to as Sep. App.).

Meanwhile, on December 19, 1974, respondents filed their notice of appeal of Judge Zampano's decision of October 24, 1974, ordering expungement of petitioner Cardaropoli's "Special Offender" designation and enjoining any redesignation without first affording minimum due process protections. App. at 26. 4/

3/ On December 23, 1974, the Court had ruled favorably on a virtually identical Application for Supplemental Relief on behalf of two inmates who, like appellee Cardaropoli, had received "Catalano orders" expunging the "Special Offender" designation, but who were still denied furloughs on the basis of organized crime. In finding on these inmates' behalf, Judge Zampano found that appellants had openly violated the letter and spirit of Catalano by continuing to rely upon allegations of organized criminal activity, untested by the minimum due process protections required by Catalano. Castaldi and Goldman v. Norton, Civil Nos. B-74-287 & 384.

4/ The Government subsequently filed timely notices of appeals from each of the "Catalano orders" granting the other petitioners the identical relief.

ISSUES PRESENTED

1. Whether the District Court erred when it ruled that the injury flowing from the Bureau of Prisons "Special Offender" classification process constitutes a grievous loss of liberty requiring fundamental procedural due process protections?

2. Whether the due process safeguards mandated by the District Court are reasonable and appropriate in light of the substantial adverse consequences flowing from the "Special Offender" designation and the de minimis burden on the Bureau of Prisons?

STATEMENT OF FACTS

The history of these cases is unusual. Each was decided after the lower court's decision in Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1974); and each was decided by the same District Judge who decided Catalano. There were no evidentiary hearings and no findings of fact specifically concerning the above-named petitioners in these consolidated cases. In Catalano, however, extensive evidentiary hearings were held at which eight witnesses testified, numerous exhibits were introduced and comprehensive legal memoranda were filed by the parties. Moreover, the Court below deliberated for five months after taking the case under advisement and wrote a thorough opinion.

The government did not appeal the Catalano decision, however, despite the 60-day period afforded by 28 U.S.C. §§ 2107. As a consequence of the Government's failure to appeal Catalano, the present petitioners appear before this Court in a case with no findings of fact and a meager record in the Court below. In view of the lower court's determination that these petitioners had been classified in violation of the principles enunciated in Catalano and the unsatisfactory record in these consolidated cases, consideration of the Court's findings in Catalano is required.

A. Purpose of the Special Offender Designation.

Bureau of Prisons' Policy Statement 7900.47 (4-30-74) provides that certain special categories of offenders "require greater case management supervision than the usual case." App. at 73. Specifically, if designated a "Special Offender," an inmate may not be transferred or participate in community programs without prior approval from the Central Office of the Bureau of Prisons in Washington, D.C. Section 5(2) of the Policy Statement includes among those offenders necessitating "special handling" individuals "involved in sophisticated criminal activity of an organized nature, or

...close or frequent associate[s] of individuals involved in organized criminal activity." This Policy Statement represented an attempt by the Bureau of Prisons, during the pendency of the Catalano litigation, to codify the various practices concerning the use of the "Special Offender" stamp. Catalano, supra, at 348-49. The Court below found in Catalano that prior to the issuance of these criteria there were no written rules, regulations, instructions or policy statements to aid the institutional decision-maker faced with a potential "Special Offender."

During the proceedings, caseworker Smithers stated that the notation was written on a prisoner's file if he needed to be followed from institution to institution. 383 F. Supp. at 348. Caseworker Lefebvre testified that the label indicated the inmate was associated with organized crime activities, and Mr. Edwards, Chief of Classification and Parole at the F.C.I. and the caseworkers' immediate supervisor, maintained that the characterization was placed in the records if there was any reason a prisoner could not be transferred without Bureau of Prisons approval. In the face of inconsistent testimony by Bureau of Prisons personnel, the Court concluded that a "Special Offender" designation is used to control the transfer and release of any inmate who is a state prisoner, a member of organized crime, a custody risk, a notorious person, or a threat to a high government official. 383 F. Supp. at 348.

B. Application of the Special Offender Designation.

Under the regulations now in force, the institution will make the initial "Special Offender" determination based on court records, information from the Central Office, or other "reliable sources." That determination will then be reviewed by the Central Office of the Bureau of Prisons, and if confirmed, the inmate will not be transferred or be allowed to participate in community programs without prior approval of the Central Office. A stamped notation of these restrictions is then recorded in the

prisoner's file at the institution. At no time is the inmate informed that the label has been recommended or approved, nor is he apprised of the underlying evidence and afforded an opportunity to be heard or contest the classification. In most cases, the inmate first learns of his classification when he requests a furlough or a transfer and is told that his application must be approved at the Bureau of Prisons national level. Upon inquiry, he may be advised that the "general" reason for the classification is "organized crime."

Testimony of institutional staff and Bureau officials during the Catalano proceedings also underscored the lack of any definite or precise criteria underlying the application of the "Special Offender" classification. Decisions were based on vague, indefinite and varying sets of guidelines, at times on the "folklore" of prison practices.[5/] See testimony of Caseworker Smithers in Sep. App. at 81-95, and Chief of Classification and Parole Edwards in Sep. App. at 124-39, 143-62. The following colloquy is especially illustrative of this difficulty:

> THE COURT: Will you...agree with me that with respect to the categories we have been talking about, they're fairly well defined, except when we get to the range of organized crime? Now, I'm not forming any judgments, but will you agree with me that the case workers had some difficulty with that category? If my recollection of the testimony was correct, I remember the words 'vague,' 'matter of judgment,' 'when I'm not sure, I see my superior,' 'I prefer you ask my superior to answer that question,' and so forth, that the phrase itself is not only troublesome to Courts, but even to men who are not

---

5/ Despite the recent promulgation of guidelines by the Bureau of Prisons to aid it in the application of the "Special Offender" designation, the definition of "organized crime" remains elusive in the entire criminal justice system. See Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973). See also recent amendments to Parole Board Regulations at note 10; Cf. United States v. Duardi, 384 F. Supp. 874 (W.D. Mo., 1974) (when sentencing individuals pursuant to 18 U.S.C. § 3575, the government is required, inter alia, to set out with particularity the reasons why an individual is a dangerous special offender).

> lawyers, like yourself, isn't that true?
>
> THE WITNESS: It's an institutional problem. It is not so vague in my mind, of course, and...my judgment, but with the lack of written instruction, the workers have some difficulty.

Sep. App. at 144-145.

C. Consequences of the Special Offender Classification.

Whatever the purposes of the "Special Offender" classification, the court found in Catalano that its application effected a profound change in an inmate's status. "In most cases, the designation delays or precludes social furloughs,6/ release to halfway houses and transfers to other correctional institutions; in some cases, the characterization may bar early parole." 7/ 383 F. Supp. at 350.

6/ Furloughs were authorized by the Congress of the United States in an amendment to Public Law 93-209, which is 18 U.S.C. § 4082(c) and which provides:

> The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust by authorizing him, under prescribed conditions to: (1) visit a specifically designated place or places for a period not to exceed thirty days and to return to the same or another institution or facility.

This provision was designed to achieve "...two important goals: The maintenance and reinforcement of the offender's family and community ties during the period of his incarceration and the development of graduated release procedures which help ease the transition from confinement to life in the community." S. Rep. No. 93-218, 93d Cong., 1st Sess. 2 (1973).

7/ "Early" parole refers to the fact that under the Board's relatively new parole decision-making procedures, which employ the so-called "guidelines" for parole release, inmates are eligible for parole release earlier than the prescribed guideline period if they meet the prescribed criteria, e.g., "exceptionally good institutional program achievement." See 28 C.F.R. § 2.20 (1975).

Petitioners Catalano and Ingoglia in Catalano had both applied for furloughs and received approval at the institutional level. Since they were "Special Offenders," however, the staff's decision had to be referred to Washington for ratification. After five weeks, Catalano's application was denied. Ingoglia's application had not been acted upon at the time of the proceedings. In fact, Mr. Edwards, Danbury F.C.I.'s Chief of Classification and Parole, admitted under cross-examination at the Catalano evidentiary hearing that inmates designated "Special Offenders" are significantly disadvantaged when applying for furloughs, not only because of the resultant delays and stricter scrutiny, but because such inmates must display a "compelling need" not required of other inmates.

> Q: And it is more difficult for somebody with a special case designation to get approved for furlough?
>
> A: [O]rdinarily furloughs will not be granted for persons identified with large-scale criminal activity. Unless there's a compelling reason.
>
> Q: Doesn't that make it harder for somebody to get a furlough if he's a special case?
>
> A: In fact, but in reality, it does not.
>
> Q: I find it difficult to distinguish between fact and reality....But other people don't have to have a compelling reason to outweigh their special case designation do they? ...But you only require a compelling need for somebody who's a special case?
>
> A: That's true.

Sep. App. at 140-42; see also Sep. App. at 68. 8/ Subsequent proceedings in

---

8/ During the Congressional hearings preceding the amendment to Public Law 93-209, 18 U.S.C. § 4082(c), the Director of the Bureau of Prisons observed:

> [C]onstructive family relationships can play [an important role] in the overall favorable adjustment of offenders. There are times when periodic home visits can be justified for reasons other than emergencies. The opportunity to participate in special religious holidays and many other important family functions that mean so much to all of us can be a critical step in changing attitudes and developing positive behavior.

93 Cong. Rec. 7974 (1973).

the court below have underscored the insurmountable difficulties facing "Special Offenders" in their attempts to receive furlough considerations, and have reinforced the manifest correctness of the court's findings in Catalano. 9/

9/ During the course of the supplemental proceedings in Castaldi v. Norton, Civ. No. B-74-287 and Goldman v. Norton, Civ. No. B-74-384, following the decision in Catalano (See note 3 supra), both Goldman and Castaldi testified that they had been told by officials of the F.C.I. that Special Cases do not receive furloughs. See. Sep. App. at 298. In his affidavit Mr. Castaldi explained:

> "I first applied for a furlough on or about July 29, 1974. My Classification and Reclassification Team E headed by my casemanager...denied the furlough.
> "I thereafter discussed the furlough denial with Mr. Jerome Edwards, Chief of Classification and Parole, who said that I was affiliated with organized crime....
> "I next discussed the furlough denial with Mr. Max Weger who stated that...
> "there would be no furloughs for special cases. He further told me that it was a waste of my time to apply."

Sep. App. at 258.
Subsequently, in Cardaropoli v. Norton, the following exchange occurred between the Court and appellees' counsel:

> MR. O'DONNELL:....Now, in Catalano, the Court was faced with special offender label, or special indication of the Bureau of Prisons. The Court found that there were disabilities that - I won't say virtually automatically flowed from that designation, but almost automatically.
>
> THE COURT: Well, there was evidence in those cases. I remember one exhibit saying something to the effect: "Your request for CTC denied - special case," or something like that. I think we had very candid testimony where witnesses said, "I did say to the prisoner you are a special case, and as a result, don't expect early parole and don't come around looking for furloughs."

Sep. App. at 413.

In addition, when petitioner Ingoglia in Catalano applied for a transfer to a CTC,the institutional staff approved. Were it not for the "Special Offender" label, he would have been immediately sent to a Halfway House; however, because of the special designation, Ingoglia's request was referred to the Bureau of Prisons Central Office which denied permission for the transfer. During the Catalano evidentiary hearing, caseworker Smithers acknowledged that the "Special Offender" designation had deprived Ingoglia of transfer to the CTC:

> THE COURT: You will admit that if he wasn't SC [Special Case] he'd be at the Community Treatment Center?
>
> THE WITNESS: This, essentially,...is correct.

Sep. App. at 70.

The effects of the "Special Offender" designation on "early parole" were shown to be equally adverse during both the Catalano evidentiary hearings and in subsequent proceedings. Both caseworker Smithers and Bernard Wrenn, chief hearing examiner of the United States Board of Parole, testified that the "Special Offender" designation and the reasons for that designation are included in the files and the progress reports submitted by the correctional institution to the Board of Parole. Sep. App. at 70, 173. In a sworn affidavit, Mr. Wrenn stated:

> [T]he special offender stamp may be placed in a file because the prisoner is associated with organized crime. In that situation, the basis for the special offender classification would be relevant to parole consideration.

Sep. App. at 245-46.

If the parole hearing examiners deemed significant that information contained in the inmate's file regarding organized criminal involvement, they would then refer an inmate to the Regional Director for possible designation

as an "Original Jurisdiction" case and parole decision at an en banc proceeding. 10/ Classification by the Board of Parole as an "Original Jurisdiction" case because of purported involvement with organized crime constitutes a formal mandate to the Regional Directors to consider an inmate for parole in the light of seriously prejudicial information. Inmates are excluded from en banc proceedings and are totally deprived of a face-to-face meeting with the parole decision-makers. At no time are they informed of the factual allegations underlying their special treatment, nor are they afforded any opportunity to contest the information relied upon by the Board. The en banc proceeding is conducted in total secrecy. Casemanager Lefebvre testified at the Catalano

---

10/ 28 C.F.R. § 2.17, at the time of petitioner's hearing, provided that persons whom the Regional Director had reason to believe may have been professional criminals or may have played a significant role in an organized criminal activity would be accorded special treatment by the Board:

> A Regional Director may designate certain cases to be within the original jurisdiction of the Regional Directors. All original jurisdiction cases shall be heard by a panel of hearing examiners. ...A summary of this hearing and any additional comments that the hearing examiners may deem germane shall be submitted to the five Regional Directors.The Regional Directors shall make the original decision by a majority vote.

In its most recent amendments to its Regulations the Board deleted the organized crime category as a basis for such designation and established a new category which consists of

> "...crimes involving an unusual degree of sophistication or planning which were part of a large scale criminal conspiracy or a continuing criminal enterprise....Increased voting quorum requirement for these cases is designed to protect the public's confidence in the integrity of Parole Board decisions by providing a broadly-based consensus of Board members in cases where there is more likely to be public interest in the grant or denial of parole." 40 Fed. Reg. 5357 (Feb. 5, 1975). (Emphasis added.)

evidentiary hearing that designation as a "Special Offender" may trigger the "Original Jurisdiction" procedures employed by the Board of Parole. Sep. App. at 106. 11/

11/ Subsequent events have bolstered the lower court's findingsin this regard. During an evidentiary hearing held in Cardaropoli v. Norton, B-74-467 on Feb. 11, 1975, the following colloquy occurred:

> MR. O'DONNELL: Now, I'm going to recount an incident that occurred at the December parole hearing, which I think really bears right down on this problem, may help us a bit. I represented an inmate by the name of Mr. Johnson, who had been a special offender. This Court ordered his special offender expunged in late November under Catalano. We go into the parole hearing, I believe it was December 8th, and Mr. Wrenn, I believe, the chief examiner was there that day, and I brought up the matter early in the hearing. I said, 'Now, do your records reflect that we have had this expunged?'
> Mr. Wrenn says, 'Not only does it reflect it, we're not going to go into that, we're not going to talk about that. Now that it's been expunged, it's got nothing to do with us, and no en banc will result. ...Now, the point is that he did not get it referred to en banc, because he had been expunged.
> Now, the Board has maintained in past litigation that they look behind this, but the Court found in Catalano that it does have an impact.
>
> THE COURT: ....Where Mr. Wrenn has said,
> "Okay, we've not only taken off the label, and we're not considering," and he's a man of candor and respect, and I'm pleased to hear that...." (Emphasis added).

Sep. App. at 415-18.

Although none of the petitioners in the Catalano proceeding were designated "Original Jurisdiction" by the Board of Parole, no government witness would deny that the allegations of organized crime underlying the "Special Offender" classification might have an important impact on the Board's deliberations:

> THE COURT: Can an examiner take organized crime affiliations into consideration in deciding whether or not to recommend parole without recommending an en banc hearing?
>
> THE WITNESS (Mr. Wrenn): Yes...we could do that.

Sep. App. at 193. Furthermore, those allegations could have a devastating effect on the application of the Board's guidelines to the inmate: 12/

> THE COURT: Is the designation "organized crime" a reason in itself to go outside of the guidelines?
>
> THE WITNESS: Not necessarily, it might be, but not necessarily. (Emphasis added).

The colloquy continued:

> THE COURT: Could an examiner take somebody outside of the guidelines on the basis of organized crime without referring it to en banc consideration?
>
> THE WITNESS: We would take him outside of the guidelines on the basis of the severity of the offense, probably is what we would take him outside, we felt the offense was so severe they should go outside the guidelines. 13/
>
> THE COURT: But not on the basis of organized crime affiliations?
>
> THE WITNESS: Not necessarily, no.
>
> THE COURT: Not necessarily?
>
> THE WITNESS: We probably could...

Sep. App. at 193-4. Thus, the Court found that designation as a "Special Offender" may also bar early parole.

12/ 28 C.F.R. §§ 2.20 provides for the establishment of paroling policy guidelines which indicate the customary range of time to be served before release for various combinations of offense severity and offender characteristics. See, e.g., United States v. Slutsky, F. 2d (2d Cir. April 18, 1975) Nos. 72-2004, 72-2041; Garafola v. Bensen, 505 F.2d 1212 (7th Cir. 1971); Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974); appeal pending, No. 74-1222 (2d Cir.).

13/ 28 C.F.R. § 2.20(d) provides:

(continued)

D. Paul Cardaropoli.

Paul Cardaropoli entered the Federal Correctional Institution in Danbury, Connecticut, on June 8, 1973, to serve a five-year sentence for conspiracy to distribute and distribution of about one gram of cocaine. Sentence was imposed on May 14, 1973, pursuant to 18 U.S.C §§ 4208(a)(2), by Judge Gus Solomon of the United States District Court for the District of Oregon sitting by designation in the District of Massachusetts. In September, 1973, petitioner discovered that his institutional files at Danbury F.C.I. were labeled "Special Offender." At no time was he informed of the specific evidence used against him, nor was he provided with a written decision setting forth the factual basis for the classification or a definite, clear standard by which the "Special Offender" classification was made. He was informed in general terms that the basis for his special treatment consisted of allegations concerning the place where he had worked in the community. (App. at 5). At no time was he afforded any opportunity to be heard or to rebut charges. Requests for Administrative Remedy were submitted by petitioner to the Bureau of Prisons in December, 1973, (App. at 5-6) and July, 1971, (Sep. App. at 327-28), complaining of this "Special Offender" classification. Each was denied.

It was only during the course of the proceedings in the Court below that petitioner learned the basis for his "Special Offender" classification. The label was affixed by the Bureau of Prisons, the Government indicated, based upon information contained in a 792 Form, "Report on Convicted Prisoner by United States Attorney," submitted by Paul Coffey, Strike Force Attorney, Hartford, Connecticut. Mr. Coffey alleged that petitioner:

> (1) Associated with several well-known organized crime figures in western Massachusetts; (2) Owned and operated the Hideaway Lounge in Springfield, Massachusetts, a known center for

---

The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating circumstances in a particular case may justify a decision or severity rating different from that listed. Allegations of organized criminal activity might constitute such special circumstances.

> prostitution and drug-related offenses; (3) Was present at the so-called "Little Appalachia" meeting in Worcester, Massachusetts, which was attended by every known organized crime figure from Massachusetts and Rhode Island. App. at 9-10.

In March, 1974, after ten months in custody, petitioner met examiners of the United States Board of Parole at the Federal Correctional Institution in Danbury, Connecticut. At that time the examiners questioned petitioner about circumstances surrounding his offense and conviction, his criminal record, his job and family, his institutional progress and program achievement and his release plans. At no time did the examiners confront him with allegations of organized criminal activity. Sep. App. at 365-66. Nevertheless, at the conclusion of the hearing, the examiners informed petitioner that no decision could be made in his case at that time. They said he would be referred to the Regional Director for possible designation as an "Original Jurisdiction" case and parole decision at an en banc proceeding. They did not tell him why he was being so treated. He was furnished with no reasons, nor was he informed of the basis for that possible designation. On April 8, 1974, petitioner received a notice from the Board of Parole, following an en banc parole determination, informing him of the Regional Directors' decision to continue his sentence to expiration with a review on the record in December 1974. Petitioner was again denied parole subsequent to that December review, and his sentence was continued to expiration. The reasons provided were:

> After careful consideration of all relevant factors and information presented it is found that a decision outside the guidelines at this consideration does not appear warranted because the offense was part of an organized criminal conspiracy and ongoing criminal enterprise. 14/

14/ Petitioner filed a petition for habeas corpus relief complaining of his treatment by the Board of Parole as an "Original Jurisdiction" case. Cardaropoli v. Norton, B-74-467. This action is pending. During the course of those proceedings, petitioner learned that the basis for his selective parole treatment was the very same information contained in the 792 Form, filed by Mr. Paul Coffey, used by the Bureau of Prisons to classify petitioner a "Special Offender." Sep. App. at 391.

In June, 1974, petitioner first became eligible for a furlough. Sep. App. at 323. He had fulfilled all of the general requirements listed in both the F.C.I. Danbury Policy Statement (Feb. 27, 1974) and the Bureau of Prisons Operations Memorandum 7300.12C (7-23-74). App. at 66. See Sep. App. at 324-25. His wife was not well and required an operation on her bladder. His stepchildren were depressed. See App. at 46 and Sep. App. at 424. Despite a compelling family need, an exemplary institutional disciplinary and program performance record, and a history free of violence, petitioner's furlough request was denied by his institutional counseling team in June, 1974. At that time no specific reasons for the denial were revealed. Petitioner's casemanager alluded generally to the place where petitioner had previously worked as a barman. Sep. App. at 326. An administrative appeal to the warden was subsequently denied, and petitioner then appealed the institution's decision to the Director of the Bureau of Prisons, alleging on information and belief that he had been denied a furlough because of his designation as a "Special Offender." He categorically denied any association with organized criminal activity. 15/ The Bureau's response was signed by Eugene Barkin, Assistant Director, and stated:

> We have reviewed your complaint regarding the furlough and special offender designation and discussed your case with the staff of the Department of Justice. The records of the Department of Justice show that you are a known associate of persons connected with organized criminal activity. Further, you attended a meeting in Worcester, Massachusetts, of persons who were associated with organized criminal activity. Consequently, we find the special offender designation is not inappropriate. Except in unusual circumstances, which we do not see here, social furloughs are not ordinarily granted to persons significantly

---

15/ Section 5(c)(2) of the Bureau Memorandum provides: "Ordinarily, furloughs will not be granted for persons identified with large scale criminal activity...." App. at 69.

> associated with organized criminal activity. We, therefore, affirm Danbury's staff's response to you. (Emphasis added).

Sep. App. at 327.

At no time was petitioner afforded the opportunity to contest those allegations at a face-to-face meeting with the decision-makers, nor was he provided any specific factual basis for the allegations to which he could meaningfully respond. 16/ Rather, petitioner was required to go to Court to have that "Special Offender" designation removed on October 24, 1974, purusant to Catalano. Moreover, it subsequently became apparent that the allegations upon which the Bureau and the F.C.I. had relied when they classified petitioner a "Special Offender" and denied his furlough requests were devoid of an factual foundation. During the course of an evidentiary hearing held

---

16/ During an evidentiary hearing held in Catalano v. United States, the following interchange occurred between the Court (Zampano, J.) and Jerome Edwards, the Chief of Classification and Parole at F.C.I. Danbury:

> THE COURT: ... do you think a man who has been given a special case designation has a right to object to it?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: All right. Do you think that the administrative remedies by which he writes on a small piece of paper adequately gives him a forum to challenge that special designation?
>
> THE WITNESS: Yes, sir, I do.
>
> THE COURT: And I take it, therefore, that responses such as, "You have been designated a special case by the Bureau of Prisons, central office, acting on the recommendation of chief classification and parole, F.C.I., Danbury, the designation of special case was made because information from investigation reflects...a probable link with organized crime. Request for special case designation removal denied," you feel that's an adequate answer, and a person receiving that will say, "now I know why I have a special case designation, because I have learned something I didn't know before?" ....where does a prisoner get the opportunity to come in and sit down and say, "Look, I'm not a member of organized crime, I never was." ...where does he get an opportunity to challenge a designation which affects his stay at Danbury?

Sep. App. at 153-55.

on February 11, 1975, concerning petitioner's treatment as an "Original Jurisidction" case by the Board of Parole, the Court observed:

> THE COURT: All right. Now, let's take Mr. Cardaropoli. He said, "Look, I didn't attend any meeting known as Little Appalachia." First of all, what is "Little Appalachia?" ...was [it] reported in the case law anywhere?
>
> MR. MEAR: ...It was sometime ago that meeting - I think it was in late '50's or early '60's that the meeting was held....
>
> THE COURT: Well, anyway, the man denies it. Now I was United States Attorney in the early '60's and I don't recall Little Appalachia meeting, and I was very involved with organized crime in the New England area. But that doesn't mean my recollection can't be refreshed.
>
> But, in any event, he said, "I don't run this Hideaway Restaurant. I work there as a bartender." And I suppose implicit in that comment is that there's proably waiters and waitresses and other people associated with it, and the word 'run,' frankly, indicates to me, you know some type of ownership. Some type of command, somebody with authority. And with all due respect a mere bartender usually has very little authority other than his immediate job in the operation of a restaurant.
>
> So he introduces the document that somebody else owns it, or his brother, in fact.
>
> Now we all know in the Masiello case that they had that file all confused. They had the father's and son's file all mixed up. But, anyway, one inference doesn't necessarily lead to another. Then the third thing he says. I wasn't arrested 35 times. I was arrested 11 times. Well, arrests never really impress a judge too much, it's convictions that count a little more than that. And most of them are for petty gambling.
>
> And then he says, "Look, I can't even afford an attorney," which doesn't necessarily mean that he can't be a member of organized crime, but a lawyer does make certain representations that would indicate certainly not...the background that would fit into my formula. So we go on and on.
>
> Now what about all these factual charges? You see, it's not an isolated case, Mr. Mear. I know we have been over and over it, this is about the eighth or tenth case I have had, and time and time again, the government through various agencies, have demonstrated to me that serious errors have been made in this field.

Sep. App. at 392-94.

Shortly thereafter, Mr. E. O. Toft, Northeast Regional Director of the Bureau of Prisons, in a letter dated March 6, 1975, and addressed to petitioner's counsel, acknowledged that the Bureau had relied on erroneous information concerning petitioner's involvement in the Hideaway Lounge when it denied his request for a furlough. Sep. App. at 422.

On March 20, 1975, the officials at F.C.I. Danbury finally granted petitioner a five-day social furlough. Sep. App. at 427. This was a direct consequence of the expungement of petitioner's "Special Offender" classification. 17/ Thus, the final act of Cardaropoli v. Norton was not unlike that of "Special Offender" expungement cases which had preceded it. As the Court noted during the evidentiary hearing concerning petitioner's treatment as an "Original Jurisdiction" case by the Board of Parole:

> THE COURT: Now, when they start labeling a man, and we do know from prior cases and prior evidence, that that label had a distinct and immediate effect upon certain benefits at the prison, we were able to have a causal connection determination.
> Mr. Fountain's case, for example, when they remove the special case designation, all of a sudden he gets three furloughs. Which only, in my opinion, strengthens this Court's prior opinions, [that] the special case designation had grievous effects. When it was removed, all of a sudden he gets three furloughs. 18/

Sep. App. at 406-07

17/ Following the Court order to expunge petitioner's "Special Offender" designation, petitioner filed a new furlough request. On November 13, 1974, petitioner's counseling team approved the request. Counselors LeBlanc and Spencer stated that there was no longer any reason to deny petitioner the furlough because the "Special Offender" designation had been expunged. On November 15, however, the Advisory Committee vetoed the team's action on the ground that "...the nature of the offense and involvement would attract undue attention or create unusual concern in the community...." See Sep. App. at 426. Petitioner then filed an application for supplemental relief in the court below (App. at 20) complaining of the institution's failure to comply fully with the order to remove and totally expunge the "Special Offender" classification from all records and files maintained by the Bureau of Prisons or by any of its institutions with respect to petitioner. Petitioner's application for supplemental relief was denied without prejudice because he had failed to exhaust his administrative remedies. In the wake of an appeal to E. O. Toft, Northeast Regional Director of the Bureau of Prisons, petitioner's furlough request was finally granted by the institution.

18/ Following expungement of the "Special Offender" designation, furloughs were also granted to other inmates. Sep. App. at 264.

ARGUMENT

I.

THE INJURY FLOWING FROM THE BUREAU OF PRISONS' "SPECIAL OFFENDER" CLASSIFICATION PROCEDURES CONSTITUTES A GRIEVOUS LOSS OF LIBERTY REQUIRING FUNDAMENTAL PROCEDURAL DUE PROCESS PROTECTIONS.

A. PRISONERS ARE PROTECTED BY THE DUE PROCESS CLAUSE AGAINST SUBSTANTIAL DEPRIVATION OF BENEFITS AND PRIVILEGES.

It is now axiomatic that persons confined to prison are not, by virtue of that fact alone, shorn of all rights under the United States Constitution. As the Supreme Court has only recently ruled: "There is no iron curtain drawn between the Constitution and the prisoners of this country." Wolff v. McDonnell, 418 U.S. 539, 555 (1974); see also Procunier v. Martinez, 416 U.S. 396, 405 (1974). Prisoners may claim the protections of the Due Process Clause when they suffer "grievous loss of liberty" as a result of arbitrary and unreasonable actions of correctional officials. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

In the prison context, "grievous loss of liberty" has come to mean any "major [adverse] change in [an inmate's] conditions of confinement." Wolff v. McDonnell, supra, 418 U.S. at 571, n. 19. Forfeiture of good time (Wolff v. McDonnell, supra), transfer from one prison to another where the consequences of that transfer are adverse (U.S. ex rel. Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974); Newkirk v. Butler, 499 F.2d 1214 (2d Cir.), cert. granted sub nom. Preiser v. Newkirk, 95 S.Ct. 172 (1974); Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974); Stone v. Egeler, F.2d (6th Cir. 1974); Walker v. Hughes, No. 39765 (E.D. Mich. Dec. 12, 1974); Robbins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974); Clonce v. Richardson, 379 F. Supp. 383 (W.D. Mo. 1974)) and long-term segregation (Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975); Taylor v. Schmidt, 380 F. Supp. 1222 (W.D. Wisc. 1974); Fife v. Crist, 380 F. Supp. 901 (D. Mont. 1974); Allen v. Nelson, 354 F. Supp. 505, aff'd, 484 F. 2d

960 (9th Cir. 1973)) all fall within the purview of the due process protections mandated by the Constitution. This is so precisely because each of these privations causes the inmate to suffer "grievous loss" and "fundamental fairness . . . requires that substantial deprivations should at least be premised on facts rationally determined. See Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971) (en banc), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978 (1972); United States ex rel. Campbell v. Pate, 401 F.2d 55, 57 (7th Cir. 1968); Dunn v. Calif. Dept. of Corrections, 401 F. 2 d 340, 349 (9th Cir. 1968); Shelton v. United States Board of Parole, 388 F.2d 567, (D.C. Cir. 1967) (en banc)." Newkirk v. Butler, supra, 499 F.2d at 1218.

An inmate's "protected" interests are those which can be shown to possess "real substance." Wolff v. McDonnell, supra, 418 U.S. at 558. As a prerequisite to substantiality, it is unnecessary that the particular interest be Constitutionally guaranteed, Wolff, supra, 418 U.S. at 557, or that it be characterized as a "legal right." Whether this interest be denominated a right or a privilege is likewise without legal significance. Morrissey v. Brewer, supra, 408 U.S. at 482; Sostre v. McGinnis, supra, 442 F.2d at 196 ("the distinction between a right and a privilege - or between 'liberty' and a 'privilege' for that matter - is nowhere more meaningless than behind prison walls"); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970). This view was reaffirmed by this Court only last term in United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 95 S.Ct. 488 (1974). A prisoner's interest in prospective parole was there held sufficiently substantial to mandate due process protection, despite the fact that release on parole is not required by the Constitution or by any statute. The Court reasoned:

> In our view Morrissey rejected the concept that due process might be denied in parole proceedings on the ground that parole was a "privilege" rather than a "right." See Graham v.

> Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971). Parole was thenceforth to be treated as a "conditional liberty," representing an "interest" entitled to due process protection. . . . [T]he average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a substantial "interest" in the outcome. For him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty.

Johnson, supra, 500 F.2d at 927-928 (emphasis added).[19/]

The principal element to be considered in determining the "substantiality" of an inmate interest, therefore, is the very real loss to which the prisoner might otherwise be subjected. The effects, rather than the nomenclature (e.g., privilege vs. right), of an inmate's particular status should be determinative. And at the heart of these "protected interests" is the right not to be injured by arbitrary and unreasonable actions of prison officials. As the Supreme Court held in Wolff v. McDonnell, supra, 418 U.S. at 558: "The touchstone of due process is protection of the individual against arbitrary action of government."

Moreover, when a prisoner suffers injury to a "protected" interest, it matters not whether the deprivation is said to be "necessary" to maintain prison discipline, or as respondents have argued in the instant case, for effective prison management. Brief at 19. As this Court made explicit in Newkirk v. Butler, supra, 499 F.2d at 1217:

19/ In its brief for the respondents, the Government attempts to resurrect, in a thinly-veiled disguise, the discredited right-privilege dichotomy. The Government argues that "an inmate has neither a liberty nor a property interest in not being classified as a special offender because he has no legitimate claim of entitlement to such status." Brief at 14. According to this view, due process protection may be afforded prisoner interests only because they are presently being enjoyed. Rather than focusing on the nature of the particular interests and privations, the Government seeks to create a distinction between the right to continued enjoyment of prison benefits and their prospective acquisition. As this Court noted in Johnson, such distinctions do not withstand close analysis. Whatever the immediate issue, the stakes are identical: eligibility for certain benefits and privileges within the prison walls versus their complete foreclosure.

> Classification by label (e.g., as "administrative" or "disciplinary") may facilitate prison administration but it cannot be used as a substitute for due process. . . . Where the prisoner suffers substantial loss he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard.

Thus, this Court has refused to accept administrative convenience as justification for procedures indistinguishable in their effects from punishment.[20/] Petitioners do not dispute the Bureau's duty to classify inmates. See 18 U.S.C. §4081. Rather, they contend Judge Zampano in Catalano was correct in holding that some basic machinery to insure accurate fact-finding is required when inmates are threatened with substantial deprivation of benefits and privileges. We must look behind labels to the operative effect of the challenged practice.

> It is of no constitutional consequence--and of limited practical meaning--that the institution [uses one label or another]. . . . The fact of the matter is that, however euphemistic the title, [inmates suffer grievous deprivations]. In view of this it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process."

In Re Gault, 387 U.S. 1, 27-28 (1967).

B. PRISONERS HAVE AN ENORMOUS STAKE IN REMAINING ELIGIBLE FOR SOCIAL FURLOUGHS, RELEASE TO COMMUNITY TREATMENT CENTERS, WORK RELEASE, AND EARLY PAROLE.

Social furloughs, work release, transfers to Community Treatment Centers ("halfway houses" or "CTC") and the opportunity for early parole are cognizable benefits,

---

20/ See United States ex rel. Haymes v. Montanye, 505 F. 2d 977, 980, n. 4 (2d Cir. 1974):

> After all these years of reviewing prison problems, we are not too myopic to notice the distinct possibility of arbitrary, misguided, or disingenuous invocation of administrative justification for trans-

(continued)

eligibility for which is extended to nearly all prisoners at F.C.I. Danbury. As the court below noted in Catalano, supra:

> These amenities are eagerly solicited and received by the inmates and obviously play a meaningful role in enhancing rehabilitation, reducing frustration, maintaining morale, and minimizing unrest in the prison setting.

383 F. Supp. at 351.[21/]

Inmate furloughs are treatment tools used in achieving correctional goals. They may be granted for a variety of reasons, including participation in family and selected community, religious, educational, civic and recreational activities when it is determined that such participation will directly facilitate the release transition from institution to community. See note 8, supra. By providing inmates with the opportunity to maintain or re-establish family and community ties, furloughs are an important aid in preventing a prison sentence from resulting in the complete destruction of the inmate's personal life, a situation that would clearly thwart rehabilitation and decrease chances for successful reentry into society. It was for this reason, inter alia, that Congress enacted Public Law 93-209 (18 U.S.C. §4082(c), as amended), in 1973 to broaden the scope of the furlough program. See note 6, supra. This program was to be made available to all inmates who are not dangerous, who are likely

---

> fer. Although we must, to some extent, rely upon the good faith of prison officials, the individual inmate is not left unprotected against such abuses. (Emphasis added)

See also Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975).

[21/] Under cross-examination by Mr. O'Donnell during the Agone and Castaldi supplemental proceedings, Mr. Max Weger, Associate Warden at F.C.I. Danbury, admitted that the vast majority of inmate furlough requests are approved. See Sep. App. at 278.

to live up to the trust placed in them, and who need the kinds of help community resources can provide. S. Rep. No. 93-218, 93d Cong., 1st Sess. 5 (1973).[22/]

The Community Treatment Center is also an important part of the prison system's rehabilitation program. Transfer to a CTC is prized by the inmates both because of its substantially less restrictive environment, cf. Newkirk v. Butler, supra, and because of the enhanced opportunity afforded for gradual reintegration into society. In addition, parole release must be treated as of "enormous interest" to the prisoner, and in the light of principles enunciated in Morrissey v. Brewer, supra, must be treated as a "conditional liberty" entitled to due process protections. Johnson v. New York State Board of Parole, supra.

Thus, the inmate has a large stake in being eligible for these rehabilitative programs. The government having created the right to eligibility for these programs and itself recognizing that they represent benefits through which the offender's alienation from family and community may be minimized, "the prisoner's interest has real substance, and is sufficiently embraced within [the concept of] liberty to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the government created right is not

---

22/ In enacting regulations for administering the statutorily-authorized furlough program, the Bureau of Prison's own Policy Statement on Inmate Furloughs declares:

> Furloughs can be an important part of the continuing effort which should be made to prepare offenders for release to the community.
>
> . . . Furloughs represent a program through which the offenders' alienation from family and community may be minimized. Additionally, performance on furlough provides a reality measure of release readiness.

App. at 66, 70.

Moreover, the Bureau of Prisons has recognized that

(continued)

arbitrarily abrogated. . . ." Wolff v. McDonnell, supra, 418 U.S. at 558. This view is buttressed by the fact that most inmates can expect to receive some or all of these amenities. See note 21, supra; Catalano v. United States, supra, 383 F. Supp. at 351.

Petitioners do not contend, it should be emphasized, that they may not be deprived of furloughs and transfers to CTC's without a hearing. (But see United States ex rel. Myers v. Sielaff, 381 F. Supp. 840 (E.D.Pa. 1974) where the court held that denial of admittance of a qualified inmate to a community treatment program set up by the State would result in a grievous loss and require a modicum of due process protection.) The issues raised by this appeal evoke a wholly different concern: may inmates be singled out so as to be deprived of eligibility for these programs without a modicum of due process protection?[23/]

C. THE "SPECIAL OFFENDER" CLASSIFICATION RESULTS IN THE GREVIOUS LOSS OF ELIGIBILITY FOR SIGNIFICANT PRISON OPPORTUNITIES.

The uncontroverted evidence in this case demonstrates that the "Special Offender" designation entirely deprived the petitioners of access to rehabilitative programs and has done grave damage to their reputations by stigmatizing them with the label of "organized crime."[24/] As the District Court specifically found in Catalano:

> [i]t is important that each offender with the demonstrated need and qualifications for furlough programming have opportunity for participation and not be involuntarily deprived of opportunity for participation by reason of institutional assignment and other circumstances.

App. at 71.

[23/] Thus, the government's argument that the "inmate has no legitimate claim of entitlement to those things which, according to the District Court, he was deprived of as a consequence of the classification" (Brief, 20-29) is entirely irrelevant to the issue before this Court. The Court is not required to reach the issue raised in Passero v. Warden, Civ. 5600 (S.D.N.Y., 02/11/75), where the Court held that the Bureau of Prisons need not conduct adversary hearings about "such discretionary correctional matters or devices such as CTC" (slip op. at 5). Moreover, as we have already demonstrated, whether these benefits are privileges or rights is without legal significance. See note 19, supra. Johnson v. New York State Board of Parole, supra, 500 F.2d at 927-928. This case requires this Court to consider only whether an inmate's interest in eligibility for these benefits is "protected."

[24/] See Wisconsin v. Constantineau, 400 U.S. 433 (1970); see also Board of Regents v. Roth, 408 U.S. 564 (1972); note 28 infra.

> The consequences of a "Special Offender" classification are significant. In most cases the designation delays or precludes social furloughs, release to halfway houses, and transfers to other correctional institutions; in some cases the characterization may bar early parole.

383 F. Supp. at 350.

The affidavits of petitioner Cardaropoli and the prolonged history of his attempt to acquire approval for release on a furlough (which culminated in a five-day social furlough),[25/] when taken together with the testimony and experiences of countless other "Special Offenders,"[26/] compels the conclusion that the "Special Offender" classification, in substantial part because based on unfounded and vague accusations of participation in organized criminal activity, needlessly and egregiously lengthened the application processes and ultimately resulted in complete denial of access to this and other rehabilitative programs.

Petitioner Cardaropoli had applied for social furloughs. He was exceptionally qualified for release on those furloughs. But for his placement on the "Special Offenders" list, his furlough requests would have been granted. Indeed, the expunction of petitioner Cardaropoli's "Special Offender" designation resulted in his release on a five-day social furlough.[27/]

Classification of inmates as "Special Offenders" on the basis of purported association with organized crime also represents a formal mandate by the Bureau of Prisons

---

[25/] See Sep. App. at 318ff and 427-28.

[26/] See Catalano, Ingolia, Fontana v. Norton, 383 F. Supp. 346; D'Ercole v. Norton, B-74-294, (D. Conn. 1974); Castaldi v. Norton, B-74-287 (D. Conn. 1974); Agone v. Norton, B-74-229 (D. Conn. 1974); Goldman v. Norton, Fountain v. Norton, B-74-384 (D. Conn. 1974).

[27/] See also testimony of petitioner Fontana during the Catalano proceedings. Sep. App. at 68.

to all correctional officials to treat those individuals as organized criminal figures. Thus, the consequences of that classification extend to all areas of prison life where allegations of organized crime may have a devastating impact on the responsible exercise of discretion by authorities charged with the sensitive and complex task of deciding which inmates may be released on furloughs, recommended for parole, or transferred to halfway houses and other correctional facilities. Disapproval of petitioner Cardaropoli's furlough application was mandated by Bureau of Prisons Operations Memorandum 7300.12C (07/23/74) which provides: "Ordinarily furloughs will not be granted for persons identified with large scale criminal activity. . .." See note 15, supra. In addition, petitioner Cardaropoli was denied early parole, at least partially, on the basis of his purported involvement with organized crime. See p. 17, supra.[28/]

[28/] The decision of the Court below in Catalano spoke to the "profound change in an inmate's status in prison" stemming from attaching a pejorative label to him, as a result of which he suffers adverse consequences. 383 F. Supp. at 352. The "Special Offender" classification is not, as the Government suggests, merely a "flag," assuring "that pertinent inmate characteristics are not overlooked" (Brief at 21-22). Rather, it represents formal Bureau verification of devastating allegations in an inmate's file. It does not simply "call attention to" certain allegations; it elevates those allegations to a higher level of certitude. It tells correctional officials, including the Board of Parole: "The Bureau considers these allegations reasonably grounded in fact." Thus, the Catalano decision was intended to ensure that the organized crime concept would be employed in "a rational and non-discriminatory manner." 383 F. Supp. at 350. The following colloquy between the Court and the Assistant U.S. Attorney during the supplemental Castaldi and Agone proceedings is illustrative:

> THE COURT: I have accomplished nothing, Mr. Mear, with my Catalano case if they strike the words "Special Case" off a man's record and then turn him down for being a "Special Case" or a "Sophisticated Criminal" or a "member of organized crime" [;] what have I accomplished?
>
> MR. MEAR: The Government is here in a very difficult position, we understand. I don't intend to claim that this is really outside of, certainly the spirit of Catalano, although it is not something specifically ordered by Catalano, the thing that has been afforded by the procedures which are now being used, if anything, we're not really talking about a procedure, we're talking about specific denials of people because of their believed criminal activity. As

(continued)

Thus, the court below did not err in holding that the consequences of the "Special Offender" classification are "significant" and "dire." 383 F. Supp. at 350. The findings of the District Court, as well as the factual inferences drawn by it from those findings, must be upheld unless found by this Court to be clearly erroneous. Fed. R. Civ. P. 52(a) requires that appellate courts must have a "definite and firm conviction that a mistake has been committed" before finding factual error in the judgment below." Coalition for Education in District 1 v. Board of Election of City of New York, 495 F. 2d 1090 (2d Cir. 1974), United States v. United States Gypsum Co., 333 U.S. 364, 295, (1947). In Catalano, Judge Zampano heard testimony from numerous Bureau of Prisons and Board of Parole personnel during three days of hearings. He specifically found that an inmate classified as "Special Offender" is subject to severe deprivations. Moreover, several supplemental proceedings before Judge Zampano involving the "Special Offender" designation and the hardships it causes, have reaffirmed the soundness of his findings. See pp. 10-11, supra.

> far as the benefits of having the "case" removed, we have certainly avoided the delays of consideration, we have avoided the consideration in Washington, of the furlough problem, we have avoided the parole--the problem with the Parole Board which once again has to look at the file on its own and not simply see a tab.
>
> THE COURT: But the bottom line result is exactly the same for the same reason.
>
> MR. MEAR: . . . We press our discretionary right in this area as something which your Honor has heard before, I know.
>
> THE COURT: Yes, I don't dispute your discretionary--the discretionary aspects of furlough, C.T.C., parole, all I'm saying is that if a man is denied a furlough or C.T.C. or parole because on his file it says "Special Case," [after expungement] you can['t] deny him for the very same reasons. The whole purpose of Catalano was to give a man an opportunity to come in and say, "Look, you want to classify me as a member of organized crime, let me know so I can defend myself." And we do know, we have had cases right here in this very courtroom, where the prison officials admitted that the man should not have been so classified.

Sep. App. at 271-273.

Because a "Special Offender" may be entirely deprived of fair consideration for significant prison amenities, the treatment inherent in the "Special Offender" process constitutes "grievous loss," i.e., "a profound change in an inmate's status in prison" which forecloses the small set of amenities representing liberties in the prison setting. See Catalano, supra, 383 F. Supp. at 352. The inmate's interest in eligibility for these programs is the same whether or not he was at one time a non-Special Offender. Again, as this Court observed in Johnson v. New York State Board of Parole, supra:

> A prisoner's interest [there in prospective parole and here in eligibility for rehabilitative programs] must be treated in like fashion [there to the interest in remaining on parole and here to the interest in retaining eligibility for rehabilitative programs]. To hold otherwise would be to create a distinction too gossamer-thin to withstand close analysis. Whether the immediate issue be [there release and here eligibility] or [there revocation and here deprivation of eligilibility] the stakes are the same. . . .

500 F.2d at 928.

Thus, the government's argument that an inmate has no "legitimate claim of entitlement" to any initial classification (Brief at 14-20) is entirely beside the point. An inmate enjoys a substantial interest in remaining free of classifications which deprive him entirely of fair and meaningful access to consideration for rehabilitative programs enacted by Congress for the benefit of a large percentage of the prison population.[29/] Because the decision to classify an inmate a "Special Offender" is based

---

[29/] In this regard the "Special Offender" classification is entirely different from the "initial" classifications discussed by respondents (Brief at 14-20). While an inmate is not eligible for most of the programs under consideration here if he is classified "close" or "medium" custody, those classifications differ markedly from the "Special Offender" classification (imposed for organized criminal activity) in at least three important respects:

(continued)

upon perceived facts about the inmate's behavior before entering the prison system, sometimes relating to events occurring as long as fifteen years ago,[30/] a prophylactic procedure, clearly defining the factual determinations thought relevant and enhancing the probability of their accurate determination, is constitutionally essential. The relevant facts must not be capriciously or unreliably determined. See Newkirk v. Butler, supra, 499 F. 2d at 1218.

---

(1) Classifications are generally subject to change. Petitioners were all classified "close" custody when they originally entered the Federal Correctional System, and over a period of time they were reclassified "medium" and finally "minimum" custody. The "Special Offender" classification, however, when imposed for organized criminal associations, is by its very nature permanent. The operative criteria governing the classification bear no relation to events subsequent to the inmate's incarceration. The classification is removed only if, upon review, the facts underlying the classification are found to be erroneous. Thus, while "initial" classifications do not permanently foreclose eligibility for rehabilitative programs, the "Special Offender" designation does.

(2) All inmates, when they enter the Federal Correction System, receive an "initial classification." Most are originally classified either "close" or "medium" custody. The "Special Offender" classification, however, is imposed in addition to the initial classification on an exceedingly small percentage of inmates. The Court below noted in Catalano v. United States, supra at 352, that only 39 of the 800 inmates at the FCI are "Special Offenders." And during the evidentiary hearings in that case, Mr. Butler of the Bureau of Prisons estimated that in the entire "system" there are approximately 500 "Special Offenders" out of 23,500 inmates. Sep. App. at 243. Thus, because they are singled out for selective treatment, "Special Offenders" incur disadvantages and deprivations beyond those "inevitably" caused by incarceration.

(3) Finally, unlike other classifications, the "Special Offender" classification constitutes a "stigma." See Wisconsin v. Constantineau, 400 U.S. 433 (1970), where the Supreme Court declared unconstitutional a statute permitting the "posting" of persons as excessive drinkers without affording them notice or an opportunity to be heard. Fundamental due process protections are required whenever the State attaches a "badge" of infamy to a citizen. Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[30/] Petitioner Cardaropoli was classified a "Special Offender," at least partially, on the ground that he had supposedly attended the "Little Appalachia" meeting which occurred in the late '50's or early '60's, according to the Assistant U.S. Attorney during proceedings in the court below. See p. 20, supra.

II.

DUE PROCESS REQUIRES THAT A PRISONER FACED WITH A "SPECIAL OFFENDER" CLASSIFICATION BE AFFORDED PRIOR NOTICE, PERSONAL APPEARANCE BEFORE A NEUTRAL DECISION-MAKER, OPPORTUNITY TO CALL WITNESSES AND PRESENT DOCUMENTARY EVIDENCE, AID OF COUNSEL IF THE PRISONER APPEARS UNABLE TO COLLECT OR PRESENT HIS EVIDENCE, WRITTEN FINDINGS BASED UPON SUBSTANTIAL EVIDENCE, AND THE RIGHT TO APPEAL.

After hearing three days of testimony and deliberating for some five months, Judge Zampano concluded in Catalano that the minimum protections necessary to guard against arbitrary imposition of the "Special Offender" label were ten days written notice specifying the nature of the allegations, personal appearance before a neutral decision-maker, opportunity to call witnesses and present documentary evidence, assistance of counsel or counsel-substitute if the inmate appears unable to collect or present his evidence, written findings based upon substantial evidence, and the right to appeal. Judge Zampano's conclusions are fully supported by the record in this case and are entirely consistent with the governing principles of law.

In determining the extent to which procedural due process must be afforded, it is now well-established that the interests of the penal authorities must be balanced against those of the inmates. Johnson, supra, 500 F.2d at 929; cf. Wolff v. McDonnell, supra, 418 U.S. at 556. In striking that balance, the adverse consequences to the prisoner, the likelihood of error, as well as the prison's rehabilitative goals, its interest in maintaining an acceptable level of personal security in the institution and remaining free of burdensome procedures are all weighty considerations.

The adverse consequences to the prisoner saddled with a "Special Offender" classification are not unlike those suffered in the prison discipline context, where the grevious loss consists in the deprivation of benefits and privileges. Cf. Wolff v. McDonnell, supra; Newkirk v. Butler, supra; Sostre v. McGinnis, supra. At the very

least, the Constitution requires such due process as is necessary to ensure that substantial deprivations are not imposed except after relevant facts have been "rationally determined." Unlike most cases involving discipline, however, where the interests of the inmate and staff conflict, the interests of the two parties in the present case in minimal due process coincide precisely.[31/] For "one of the most disruptive influences upon the rehabilitative scheme is the belief that the law is arbitrary." Comment, 33 U. Pitt. L. Rev. 638, 642-48 (1972).[32/] Judge Zampano's finding in Catalano conclusively supports this view:

[31/] As Judge Zampano noted in Catalano, supra, 383 F. Supp. at 351, it is significant that a non-Special Offender must be afforded minimum due process before he may be deprived of access to prison programs as a result of violation of institutional rules. See, e.g., Newkirk v. Butler, supra; Gomes v. Travisono, supra; Ault v. Holmes, 369 F. Supp. 288 (W.D.N.Y. 1973). Fundamental differences between those cases and this one, however, point up the anomaly that would be created by the result argued for by respondents. Brief at 19-20. Deprivations designed to punish and maintain order could not be inflicted without procedural safeguards, but deprivations imposed for no reason at all could be inflicted at will.

What would make such a result even more peculiar is that while in the disciplinary cases the institution's interests arguably conflict with those of the inmates, in the present case the two share the same interest in minimal due process. When a prisoner violates prison regulations, the rehabilitation of that prisoner becomes only one goal among several that the institutional response must serve, see Croom v. Manson, 367 F. Supp. 586, 589-90 (D. Conn. 1973). To maintain prison discipline, swift and perceived punishment must be imposed, if for no other reason than to deter both that individual and others from similar behavior. In addition, prison officials have a legitimate stake in imposing discipline in a way consistent with the effective administration of a prison. The inmate, of course, desires to maintain whatever minimal level of freedom he is permitted within the institution.

In the present case, there is no question of deterrence; indeed, no claim is made that petitioners deviated from prescribed standards of institutional conduct. Here, the interests of the institution and of society coincide with the inmate's desire to protect his freedom. Furloughs and halfway houses are more than forms of highly-prized conditional liberty. They are an extremely vital part of the overall effort to reconstruct a shattered life. Society has a strong interest in helping the inmate create conditions which make recidivism less likely. It is thus just as much in the interest of the Bureau of Prisons, as it is in the inmate's, that appropriate persons have access to these programs, and that eligibility for these rehabilitative opportunities not be arbitrarily or capriciously withheld.

[32/] As the former Commissioner of the Minnesota Department of Corrections has explained:

(continued)

> The "Special Offender," who has not deviated from prescribed standards of conduct, also suffers short and long range privations but is not told why or given the opportunity to contest the charges against him. It is no wonder that when a prisoner learns of his "Special Offender" status, which will foreclose liberties extended to other prisoners, he assumes, because he does not know the facts, that prison officials acted arbitrarily and unreasonably. In his depressed state of mind, he rationalizes that he has been a victim of unlawful practices, including discrimination, corruption, hearsay statements in his presentence report, and rumor, gossip, and untested information relayed to the officials by hostile "confidential" informers.

383 F. Supp. at 351.

The accurate assessment of the operative facts is as critical a matter to the Government as to the inmate in the successful administration of the "Special Offender" classification process. Moreover, the procedures for determining whether an inmate is a "Special Offender" do not themselves threaten other important governmental interests, institutional officials, the police, or witnesses. The institution's staff, for example, is not confronted with an emergency situation nor with the volatile tensions surrounding a disciplinary confrontation. In the same vein, the administrative burdens would be minimal because so few inmates are "Special Offenders." See note 29, supra.[33/]

> The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to accept responsibility for the consequences of his behavior. . . . The prison experience [should] try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.

Fogel, "The Justice Model for Social Work in Corrections," Social Work Practice and Social Justice 26, 32 (N.A.S.W. 1972).

[33/] In response to questions from the Court below during the Catalano proceedings, Mr. Butler, executive assistant to the warden of the U.S. Penitentiary at Lewisburg, and formerly chief of the population control section in the Bureau of Prisons Central Office in Washington, D. C., testified:

(continued)

Finally, the likelihood of factual error occurring in the federal correctional process is hardly remote, because federal prison records are notoriously inaccurate.[34/] The history of the "Special Offender" designation is fraught with examples of reliance by both the Bureau of Prisons and the Board of Parole on devastating and erroneous allegations of organized criminal activity. For example, in Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973), where John Masiello, Jr., was repeatedly denied parole on the ground that he "might become" a member of organized crime, two years of legal battles culminated in the belated disclosure that he was not considered in the Organized Crime Strike Force in New York to be a member of organized crime. Indeed, in the instant proceeding, the Bureau of Prisons has confessed error with respect

---

> It's my personal opinion, your Honor, that if a man's a special-stamped a Special Offender, he should be told so, and he should be told why; I find nothing wrong with it. We-- you know, we naturally can't say that we don't make mistakes. . . . I see nothing wrong with telling a man he's on the special offender list and letting him have his say there at the institution when the classification is made.

Sep. App. at 212-213.

[34/] In rendering important decisions affecting an inmate's classification, custody status, program opportunities, and parole chances, both the Bureau of Prisons and the Board of Parole rely essentially upon the same central files maintained on each inmate. As researchers for the United States Board of Parole have complained:

> Unfortunately, the files are not uniformly complete and frequently include obviously conflicting information [such as vocational or educational programming and drug use].
>
> In one file, an inmate was listed as an illiterate who spoke only Spanish at admission. A later report listed the inmate as having completed 40 hours of college credit. . . .
>
> Instances of misfiling are frequent. Often a report will indicate that the subject is a white male, while the picture in that same file shows what appears clearly to be a black (or vice versa). Presentence reports are often found inaccurately filed. . . .

(continued)

to certain of the allegations concerning petitioner Cardaropoli's purported organized criminal involvement.[35/] As the Court below noted during its inquiry into petitioner Cardaropoli's treatment as an organized criminal figure by the Board of Parole:

> THE COURT: Now what about all these factual charges? You see it's not an isolated case, Mr. Mear . . . time and time again the government through various agencies have demonstrated to me that serious errors have been made in this field. For example, we had a member of the Board of Parole that said he investigated three of the cases that the Bureau of Prisoners labeled Special Case, and concluded that the Bureau was in error.

Sep. App. at 394.

The colloquy continued:

> THE COURT: . . . So you know, case after case, this organized crime designation has been extremely troublesome. And, I could tell that you are a little bit troubled by it in Fountain's case.

> Numerous examples of discrepancies in the files could be cited [such as birth dates, and date of first arrest]. . . .
>
> The inmate's arrest record is an important source [of information]. In many cases no specific information is given about the number of prior arrests, convictions, dates, fines, or time actually served. The Federal Bureau of Investigation arrest records which appear in many of the files are very difficult to use, since the same arrest and conviction may be entered six or seven times at each stage of arrest, transfer, conviction, and incarceration; and dispositions often are not shown.
>
> . . . [This] lack of uniformity, clarity, and concern for the accuracy of information [in prison files] sets obvious limits upon the quality of information which may be reliably extracted from the files. . . .

S. Singer & D. Gottfredson, Development of a Data Base for Parole Decision-Making, 2-5 (NCCD Research Center, Supp. Report No. 1, 1973).

35/ See letter from E. O. Toft, Sep. App. at 422.

> MR. MEAR: I am troubled by it in Fountain's case, your Honor, I have to honestly admit that. . . and I personally am satisfied that Mr. Cardaropoli is not a member of organized crime.36/

Sep. App. at 395.

In light of similar considerations, a recent empirical study in the Yale Law Journal, based upon observing over 100 federal parole hearings, has not

> There is no reason why an inmate should have to wait for an error to be corrected through the administrative process, or eventually by the courts, when the likelihood of error is fostered by the absence of safeguards and lack of fairness in the original determination.

Project, "Parole Release Decisionmaking and the Sentencing Process," 84 Yale L. J. 810, 862 (1975). See also note 16, supra.

Under these circumstances, the Court below properly held that fundamental fairness requires that the inmate be given at least ten days notice that a "Special Offender" classification is contemplated. 383 F. Supp. at 352-53. The Bureau of Prisons

---

36/ During the course of supplemental proceedings in Castaldi v. Norton and Goldman v. Norton, (Civ. Nos. B-74-287 and B-74-384 on Nov. 25, 1974) the Court below expressed similar concerns:

> The whole purpose of Catalano was to give a man an opportunity to come in and say, 'Look, you want to classify me as a member of organized crime, let me know so I can defend myself.' As we do know, we have had cases right here in this very courtroom, where the prison officials admitted that the man should not have been so classified. And, that's without giving him a hearing, that was only after they reviewed the file without an adversary proceeding of any sort. Before they came into this courtroom they said they had looked at the file again and admitted they made a mistake. So you can imagine if a man had an opportunity to be heard, in some cases he probably would have a defense.

Sep. App. at 272-73.

has no substantial interest in immediate classification of "Special Offenders." A requirement that notice be given ten days before a hearing--to give the inmate time to gather facts and consult counsel--would therefore not impose an undue burden on the Bureau. Moreover, because of the complexity of the factual determination, it is appropriate that the notice be in writing and detail the allegations. Otherwise, the notice period is valueless. Cf. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, supra.

Judge Zampano also correctly concluded that the inmate must be afforded a personal appearance before the decision-maker and be permitted to call witnesses and present documentary evidence. 383 F. Supp. at 353. See Wolff v. McDonnell, supra, 418 U.S. at 566. Although counsel need not always be furnished, "if the issues are complex or the inmate appears unable to collect or present his evidence, he should be permitted counsel or counsel-substitute." Catalano, supra 383 F. Supp. at 353. See Goldberg v. Kelly, supra, 397 U.S. at 270-271; Hoitt v. Vitek, supra, 361 F. Supp. at 1253. See also Morris v. Travisono, 310 F. Supp. at 873. The hearing officer must be impartial and must submit written findings based upon substantial evidence and the right to appeal must be preserved. Catalano, supra, 383 F. Supp. at 353.

While safeguarding against purely arbitrary deprivations and reliance upon erroneous information, these basic due process procedures, modeled after Wolff v. McDonnell, supra, impose an insignificant burden upon the Bureau of Prisons. As Judge Zampano concluded in Catalano, "the potential impact of formalized procedures upon the penal authorities' time and convenience is minimal. . ." 383 F. Supp. at 352. Because Judge Zampano in Catalano ruled out a "trial type" proceeding for inmates, cf. Masiello v. Norton, supra, 364 F. Supp. at 1137, and because he did not afford petitioners all the procedural amenities they sought, the Government cannot be heard

to argue that "'the additional time and expense possibly involved [with Catalano-type proceedings] will seriously handicap the effective functioning of [the "Special Offender" classification process.]' Bloom v. Illinois, 391 U.S. 194, 208-09 (1968). Due process cannot be measured in minutes and hours or dollars and cents." Taylor v. Hayes, 418 U.S. 488, 500 (1974). Likewise, any justification for relaxing or dispensing with these fundamental due process protections disappears in this setting because "unlike most cases involving discipline for a specific act or acts, the institution's staff is not confronted with an emergency situation. . . ." Catalano v. United States, supra, 383 F. Supp. at 352.

These modest procedures serve the salutary function of furnishing the inmate the essential facts upon which the Bureau's inferences are based. The Bureau's present "Special Offender" classification process, however, affords the inmate no opportunity to learn, much less to challenge, the purported factual basis for his classification and thus provides no "meaningful hedge against erroneous action." Goss v. Lopez, 95 S.Ct. 729, 741 (1975).

> The prisoner, the community, and a reviewing Court are left in the dark as to whether [the Bureau] applied permissible criteria, considered relevant factors, and acted rationally rather than pursuant to whim and caprice in any given case.

Johnson, supra, 500 F.2d at 930.

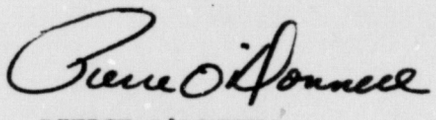
Since petitioners received none of the safeguards mandated by Catalano, their classification as "Special Offenders" deprived them of their liberty without due process of law contrary to the Fifth Amendment to the United States Constitution.

CONCLUSION

As the Court below in Catalano properly held, the consequences of the Federal Bureau of Prisons "Special Offender" classification are significant and dire. In most cases the designation delays or precludes social furloughs, release to half-way houses and transfers to other correctional institutions--amenities eagerly solicited by the inmates and which play a meaningful role in enhancing rehabilitation, maintaining morale, and minimizing unrest in the prison environment. In some cases, the "Special Offender" characterization may bar early parole. Since the designation works a profound change in an inmate's status in prison, an inmate has a vital interest in the fairness and integrity of the decision-making process. Accordingly, the Fifth Amendment to the United States Constitution compels the Bureau to afford fundamental procedural due process guarantees before imposing classifications having devastating consequences.

In light of the foregoing, the District Court's judgment, directing the Bureau of Prisons to remove and totally expunge the "Special Offender" classification from the records and files of the petitioners-appellees and further enjoining the Bureau from reclassifying them as "Special Offenders," unless accorded procedural due process, was entirely proper and should be affirmed.

Respectfully submitted,



PIERCE O'DONNELL
DENNIS E. CURTIS
STEPHEN WIZNER
MICHAEL J. CHURGIN

Attorneys for Petitioners-Appellees
127 Wall Street
New Haven, Connecticut 06520

On Brief:

ERIC A. SCHWARTZ
Yale Law School
Class of 1976

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Petitioners-Appellees were mailed to Thaddeus B. Hodgdon, Special Litigation Section, Criminal Division, Room 300, United States Department of Justice, Washington, D. C. 20530, this 28th day of April 1975.

Pierce O'Donnell

PIERCE O'DONNELL

Attorney for Petitioners-Appellees